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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1256

KOEHRING COMPANY, *Petitioner*

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	3
Questions Presented	3
Statute Involved	4
Statement of Case	4
I. Basic Facts	4
II. Proceedings Before the Oklahoma Federal Court	5
III. First Appellate Review	6
IV. Proceedings Before the Oklahoma Federal Court on Remand After This Court Reversed Tenth Circuit Court of Appeals	7
V. Current Appellate Review	7
Reasons for Granting the Writ	8
I. The Decision Below Conflicts With a Prior Decision of This Court in This Case	8
II. The Decision Below Conflicts With Prior Decisions of Other Courts of Appeal and of this Court	8
III. The Case Presents Important Questions Which Should be Settled By This Court	12
IV. A Decision in This Case Will Also Govern a Companion Criminal Contempt Case Presently Before the Tenth Circuit	13
Conclusion	13

Page

Appendix A — September 1, 1964 Order and Memorandum of U. S. District Court for Northern District of Oklahoma 15

Appendix B — April 18, 1966 Order of U. S. District Court for Northern District of Oklahoma and Accompanying Findings of Fact 21

Appendix C — January 24, 1968 Opinion of U. S. Court of Appeals for the Tenth Circuit in case at bar 25

Appendix D — January 24, 1968 Opinion of U. S. Court of Appeals for the Tenth Circuit in companion criminal contempt case, Vardaman S. Dunn vs. United States of America 45

Appendix E — July 21, 1965 Opinion of U. S. Court of Appeals for the Tenth Circuit on an earlier review of the Oklahoma District Court's September 1, 1964 Order 49

Appendix F — January 17, 1966 Opinion of U. S. Supreme Court on review of Tenth Circuit's July 21, 1965 Opinion 61

Appendix G — January 25, 1966 Petition of Hyde Construction Co., Inc. to U. S. Supreme Court for Rehearing and Motion to Amend This Court's Order of Remand to Oklahoma District Court.... 65

Appendix H — This Court's March 7, 1966 Denial of Hyde's January 25, 1966 Petition and Motion.. 67

Appendix I — September 19, 1963 Order of U. S. Court of Appeals for the Fifth Circuit 69

Page

Appendix J — March 6, 1964 Order of U. S. Court of Appeals for the Fifth Circuit 75

Appendix K — March 10, 1964 Order of U. S. Court of Appeals for the Fifth Circuit 77

TABLE OF AUTHORITIES

I. *Cases*

American Ins. Co. v. Lester, 214 F. 2d 578 (4th Cir. 1954) 9, 11

Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948) 8, 13

Kline v. Burke Construction Co., 260 U.S. 226, 231-32 (1922) 11

Moss v. Burkhart, 220 F. Supp. 149 (W. D. Okla. 1963) 10

In re Potts, 166 U.S. 263 (1897) 8

Prack vs. Weissinger, 276 F. 2d 745 (3rd Cir. 1958) 9

Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F. 2d 804, 810. (9th Cir. 1963) 9

Williams v. Moss, 378 U.S. (1964) 10

II. *Statute*

28 U.S.C. §2283 ..... 4, 6, 8, 10, 11

In The

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Koehring Company (hereinafter "Koehring "), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case entered on January 24, 1968.

OPINIONS BELOW

The opinions and orders below are as follows:

The September 1, 1964 order and attached memorandum of the United States District Court for the Northern District of Oklahoma (hereinafter "Oklahoma Federal Court") (Appendix A, infra);

The April 18, 1966 order of the Oklahoma Federal Court and the accompanying April 24, 1966 Findings of Fact and Conclusions of Law (Appendix B, infra);

The January 24, 1968 opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter "Tenth Circuit") on review of the Oklahoma Federal Court's April 18, 1966 order (Appendix C, infra); and

The January 24, 1968 opinion of the Tenth Circuit in a companion criminal contempt case, Vardaman S. Dunn vs. United States of America, No. 9142 (Appendix D, infra).

Proceedings on an earlier appeal in the same case are also pertinent. They are:

The July 21, 1965 opinion of the Tenth Circuit on an earlier review of the Oklahoma Federal Court's September 1, 1964 order (Appendix E, infra, 348 F.2d 643);

The January 17, 1966 opinion of the United States Supreme Court on review of that earlier Tenth Circuit's opinion (Appendix F, infra, 382 U.S. 362);

Hyde Construction Company Inc.'s (hereinafter "Hyde") January 25, 1966 petition to this Court for rehearing and motion to amend this Court's mandate to the Oklahoma Federal Court (Appendix G, infra); and

This Court's March 7, 1966, denial of Hyde's petition and motion (Appendix H, infra, 383 U.S. 939).

One of the specific issues involved here was also ruled on in this case by the United States Court of Appeals for the Fifth Circuit (hereinafter "Fifth Circuit"). Thus certain of its opinions and orders are also pertinent. They are:

The September 19, 1963 order of the Fifth Circuit (Appendix I, infra, 324 F.2d 295);

The March 6, 1964 order of the Fifth Circuit (Appendix J, infra); and

The March 10, 1964 order of the Fifth Circuit (Appendix K, infra).

Except as noted, the above opinions and orders are not yet officially reported.

JURISDICTION

The Tenth Circuit entered its judgment on January 24, 1968. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1958).

QUESTIONS PRESENTED

I

When this Court, after its January 17, 1966 reversal of the Tenth Circuit in this case, denied Hyde's motion for further appellate review of the Oklahoma Federal Court's September 1, 1964 order and remanded directly to the Oklahoma Federal Court, did this Court intend to affirm the September 1, 1964 order and thus preclude further appellate proceedings to set aside that order?

II

When a plaintiff, who has filed a suit in federal court praying for a writ of attachment, injunctive relief, a declaratory judgment and a money judgment, subsequently files an identical suit in state court, does 28 U.S.C. §2283 prohibit the federal court from temporarily restraining the plaintiff from proceeding in the state court suit?

STATUTE INVOLVED

28 U.S.C. §2283 provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

I. Basic Facts

This petition involves the violation of a restraining order, the resultant contempt hearing and the injunctive remedy ordered to purge the contempt. All have been presented to and considered by this Court in a previous opinion. 382 U.S. 362 (1966).

The basic controversy involved construction equipment at a U. S. Army Corps of Engineers project near Tulsa, Oklahoma. In August, 1961, Hyde filed this suit in the U. S. District Court for the Southern District of Mississippi (hereinafter "Mississippi Federal Court"). It prayed for a writ of attachment, injunctive relief, a declaratory judgment and a money judgment. (R. 1-6). Ap-

proximately a month later, after Koehring had moved for a change of venue to the Oklahoma Federal Court, Hyde filed an identical complaint against Koehring in the Chancery Court of Hinds County, Mississippi (hereinafter "Mississippi State Court"). (R. 250-55).

After various proceedings in the Mississippi Federal Court case, the Fifth Circuit Court of Appeals on September 19, 1963, reversed the Mississippi Federal Court and ordered that the case be transferred to the Oklahoma Federal Court for "the convenience of the parties and witnesses" and "in the interest of justice." (Appendix I, infra).

Instead of following the Fifth Circuit mandate, the Mississippi Federal Court ordered that the federal case be dismissed. Trial of the long dormant Mississippi State Court case then became imminent. Upon Koehring's petition for mandamus, the Fifth Circuit, on March 6, 1964, *restrained further proceedings in the Mississippi State Court case,* pending hearing on the petition. On March 10, 1964, the Fifth Circuit reversed the dismissal order of District Court and ordered that the Federal case be *instantaneously* transferred to the Oklahoma Federal Court. It also dissolved its restraining order because it no longer had jurisdiction. (R. 16-18). (Appendix K, infra).

II. Proceedings Before the Oklahoma Federal Court

On March 11, 1964, Koehring filed the Fifth Circuit's March 10th order in the Oklahoma Federal Court along with a petition for a temporary restraining order and an injunction against further proceedings in the Mississippi State Court case.

After a hearing that day attended by both parties, the Oklahoma Federal Judge (R. 39-84) granted a tempo-

rary restraining order virtually identical to that which had been issued by the Fifth Circuit. The order temporarily restrained Hyde and its attorneys from proceeding with the Mississippi State Court action and provided for a $10,000 bond to protect Hyde against damages if it were later found to have been wrongfully restrained. (R. 84-85).

Hyde and its attorneys refused to obey the order even though the Mississippi State Court Judge offered to postpone the trial. (R. 290). The trial then proceeded and Hyde obtained a judgment against Koehring in the Mississippi State Court.

After a hearing on March 14, 1964, the Oklahoma Federal Court entered findings and held Hyde in civil contempt.* (R. 92-129). On September 1, 1964, the Court entered the Judgment and Order attached hereto as Appendix A. (R. 162-64). In addition to granting certain costs, the judgment enjoined Hyde and its attorneys, until further order of the Court, from enforcing or collecting the Mississippi State Court judgment.

III. First Appellate Review

Upon the first appeal by Hyde, the Tenth Circuit reversed the September 1, 1964 order. It ruled that the Oklahoma Federal Court did not have jurisdiction over the subject matter of the lawsuit at the time it issued the

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* In a companion criminal contempt case the Oklahoma Federal Court found that Hyde's lead counsel, Vardaman Dunn, deliberately disobeyed its restraining order. His criminal contempt conviction however was reversed by the Tenth Circuit in view of its finding that the Oklahoma Federal Court's March 11, 1964 order was prohibited by 28 U.S.C. § 2283. (Appendix D, infra). We are informed that the Tenth Circuit has withheld its Mandate in the criminal contempt case pending whatever action the U. S. Supreme Court may take in this, the companion civil case.

March 11, 1964 restraining order. On January 17, 1966. this Court, after granting certiorari, reversed the Tenth Circuit and ordered remand directly to the Oklahoma Federal Court (Appendix E, infra).

Hyde petitioned this Court for a rehearing and moved to amend the mandate so as to send the case back, not to the Oklahoma Federal Court, but to the Tenth Circuit for further review of the September 1, 1964 order. (Appendix G, infra). On March 7, 1966, this Court denied Hyde's petition and motion to amend the mandate (Appendix H, infra).

IV. Proceedings After Remand by This Court To The Oklahoma Federal Court

Shortly after return of this Court's mandate to the Oklahoma Federal Court, Hyde moved to dissolve the September 1, 1964 injunction. The Oklahoma Federal Court denied this motion on the grounds that Hyde had already appealed from the granting of the September 1, 1964 injunction and that it had been affirmed by the U. S. Supreme Court. (Appendix B, infra).

V. Current Appellate Review

Hyde filed a notice of appeal from the Oklahoma Federal Court's denial of its motion to dissolve the September 1, 1964 injunction, and Koehring filed a motion to dismiss Hyde's appeal on the grounds of frivolity and a lack of jurisdiction. On July 27, 1966 the Tenth Circuit entered an order denying Koehring's motion. On November 14, 1966, this Court denied Koehring's petition for a writ of certiorari. Hyde and Koehring then again argued before the Tenth Circuit the same issues with respect to the September 1, 1964 order that had been argued before it in early 1965.

On January 24, 1968, the Court of Appeals reversed, ruling that the March 11, 1964 temporary restraining order issued by the Oklahoma Federal Court was prohibited by 28 U.S.C. §2283. It further ruled that the September 1, 1964 order arising out of the civil contempt proceedings for violation of the restraining order be reversed. This Court's earlier refusal to remand to the Tenth Circuit for further consideration of the September 1, 1964 order was held to be of no significance.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With a Prior Decision of This Court in This Case

On January 17, 1966, on review of the same September 1, 1964 order involved here, this Court denied Hyde's request for further review by the Tenth Circuit and remanded the case directly to the Oklahoma Federal Court for further proceedings.

The Tenth Circuit has held that this Court did not intend to settle the validity of the order by remanding the case directly to the trial court (which court clearly had stated that it intended to re-try the case) and by refusing to allow additional appellate review of the September 1, 1964 injunction order. It is submitted that such an interpretation conflicts with the ordinary meaning of this Court's action and, in fact, renders that action meaningless. Cf. *In re Potts,* 166 U.S. 263 (1897) and *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304 (1948)

II. The Decision Below Conflicts With Prior Decisions of Other Courts of Appeal and of this Court

In this very same case and on the very same fact situation, the Fifth Circuit restrained proceedings in the Mississippi State Court. (Appendix J, infra). Only after

the Fifth Circuit had transferred the case instantaneously to the Oklahoma Federal Court and surrendered jurisdiction over the case was the restraining order dissolved.

The Tenth Circuit has now made a ruling which is exactly opposite to that of the Fifth Circuit, i.e., that the federal district court which had received this case the day after the Fifth Circuit had dissolved its restraining order, was powerless to enter a similar restraining order.

Second, in issuing a ruling contrary to that of the Fifth Circuit, the Tenth Circuit cited no extraordinary circumstances requiring a different result. It is clearly the law in other circuits that, absent such extraordinary circumstances, the rule of law of a court of coordinate jurisdiction should not be reversed in the same case. *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 810 (9th Cir. 1963); *Prack v. Weissinger,* 276 F.2d 745 (3d Cir. 1958). These cases concerned the deference to be given the decision of one district judge by another, but the reasoning is directly applicable to courts of appeals.

The decision below conflicts with prior decisions of other courts of appeals as to the flexibility of the "in aid of its jurisdiction" exception. That exception is

> ". . . . meant to give sufficient flexibility that a federal court, as a court of equity, may, when it has jurisdiction, mold its process to deal adequately with the situation at hand." 1A *Moore's Federal Practice* (2d Ed.) ¶ 0.208 (3.-4) at p. 2321.

An example of a flexible approach was the decision of the United States Court of Appeals for the Fourth Circuit that a federal court, which has before it a declaratory judgment action by insurers to invalidate policies of insurance, may enjoin state court actions on the policies by the insureds, which raised the same issues as the declaratory judgment action in the federal court. In *American Ins. Co. v. Lester,* 214 F.2d 578 (4th Cir. 1954), the

Fourth Circuit held that the exercise of injunctive power in such a case is in aid of and, in fact, "essential to the effective exercise of" the federal court's jurisdiction and, therefore, not prohibited by Section 2283.

Another situation in which an injunction was justified is *Moss v. Burkhart,* 220 F. Supp. 149 (W. D. Okla. 1963), *aff'd. Williams v. Moss,* 378 U.S. 358 (1964), a reapportionment case. There the federal court* enjoined proceedings in a subsequently filed identical state court action, saying:

> "As the litigation now stands, the intervenors are in courts of two sovereign jurisdictions, alleging substantially the same subject matter and seeking substantially the same relief. The gloss of the pleadings may be somewhat different, but the subject matter of the lawsuits and the relief sought are essentially the same. The jurisdiction of both courts may be conceded, as indeed it is. The decisive point of consideration is that early in the course of this litigation, the intervenors invoked this court's jurisdiction and consented to its processes. They now seek to circumvent or frustrate that jurisdiction by provoking unseemly state-federal conflict over the same subject matter. In substance, they would remove a case into which they have intervened to another forum. In this posture, it seems important to sensitive areas of this kind that the Court having first acquired jurisdiction of the subject matter should proceed to a final determination of the tedious questions involved. Any attempted division or dual exercise of the concurrent jurisdiction can lead only to unwarranted confusion, and ought to be avoided. We think that the proper administration of justice and the maintenance of a harmonious state-federal relationship require us to restrain the intervenors from taking their lawsuit elsewhere." 220 F. Supp. at 162-63.

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* This was a three judge federal court consisting of two district court judges and the Chief Judge of the Tenth Circuit Court of Appeals.

The decision of the Tenth Circuit directly conflicts with the *Moss* decision because it allows the plaintiff to invoke the federal court's jurisdiction and consent to its processes and then circumvent that jurisdiction by provoking a federal-state conflict.* It is respectfully submitted that this Court should consider whether a plain reading of the words which allow a federal court to enjoin state court proceedings when "in aid of its jurisdiction" does not include such a situation.

The decision below conflicts with prior decisions of this Court which have established the general rule that the "in aid of its jurisdiction" exception to Section 2283 is not limited to strictly *in rem* cases where some tangible property is actually held. Any action which requests more than strictly *in personam* relief also comes within the ambit of that exception. For example, in *Kline v. Burke Construction Co.*, 260 U.S. 226, 231-32 (1922), this Court said:

> "The rule (as to when there is a 'res' which gives the first court exclusive jurisdiction) is not limited to cases *where property has actually been seized under judicial process* . . . but it applies as well where suits are brought to . . . *marshall assets,* administer trusts, or liquidate insolvent estates, and in all suits of a like nature. . . . The rule is limited to actions which deal either actually or potentially with specific property or objects. . . ." (Emphasis added).

The Tenth Circuit reasoned that both the federal and state suits were strictly *in personam* and, therefore, that Section 2283 prohibited the issuance of a restraining order. The fact that both suits prayed for a writ of at-

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* It should be noted that both the *American Insurance Co.* and the *Moss* cases were purely *in personam,* while the case at bar is *quasi in rem,* i.e., plaintiff, in addition to asking for a money judgment also prayed for a writ of attachment and injunctive relief.

tachment, a declaratory judgment and injunctive relief in addition to making a claim for money damages was held to be irrelevant. That decision conflicts with the rule established by this Court in that it requires that some property actually be seized under judicial process in order to fit within the exception.

III. The Case Presents Important Questions Which Should Be Settled By This Court

This case presents an opportunity for this Court to provide guidelines as to the power of a federal court to enjoin a party from proceeding in a state court case which is neither clearly *in rem* nor clearly *in personam*. Since it seems likely that a large number of cases fall within this middleground, such guidelines are important to many future litigants. Clearly such guidelines are needed since two courts of appeals have reached exactly opposite decisions on the same facts and issues.

This case also presents an opportunity for this Court to outline the consideration to be given the decision of one court of appeals by another in the same case. The law is clear that one district judge should not change a rule of law established by another district judge in the same case without some very good reason. This case presents an opportunity for this Court to establish that rule as between courts of appeal. The result of the decision below is that the Oklahoma Federal Court is held to have been powerless to give the same relief as the Fifth Circuit had given only five days earlier.

This case also presents an opportunity for this Court to explain the significance of its mandate being issued directly to a District Court instead of the Court of Appeals in which the case had been pending. This case

further presents an opportunity for explaining the effect of an order of this Court denying a motion to amend its mandate. Cf. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948).

IV. A Decision in This Case Will Also Govern a Companion Criminal Contempt Case Presently Before the Tenth Circuit

We are informed that the Tenth Circuit has withheld its mandate in the companion criminal contempt case (Appendix D, infra) pending whatever action this Court may take in this case.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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